1304

SUPREME COURT OF THE UNITED STATES.

No. 250.

THE DUBUQUE AND PACIFIC RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

EDWIN C. LITCHFIELD.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation and service	3	1
Bond to prosecute writ of error	5	2
Declaration in right	6	3
Defendant's plea	8	4
Agreed statement of facts	9	4
Judgment	78	48
Clerk's certificate	79	48
Assignment of errors	80	49

GIDEON, Print.

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the Judge of the District Court of the United States for the district of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in said district court before you between Edwin C. Litchfield and the Dubuque and Pacific Railroad Company, a manifest error hath happened, to the great damage of the said The Dubuque and Pacific Railroad Company, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to law and custom of the United States, should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this first Monday of December, in the year of our Lord one thousand eight hundred and fifty-eight, and of the independence of the United States the eighty-third.

Allowed.

[SEAL.]

J. M. LOVE,
Judge D. C. U. S. District of Iowa.

Issued by me, the clerk of the said district court, under its seal.

J. C. BURNS, *Cl'k.*

$1 20 pd. by J. M. McKinlay.
J. C. B.

The United States of America to Edwin V. Litchfield, greeting:

You are hereby cited and admonished to be and appear at a Su-

preme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the district of Iowa, northern division, wherein The Dubuque and Pacific Railroad Company is the plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, on the first Monday of December, in the year of our Lord one thousand eight hundred and fifty-eight.

J. M. LOVE,
Judge D. C. U. S. Dist. of Iowa.

I hereby accept service of the within citation, to have the same effect as though the same had been regularly served.

CHAS. MASON,
Att'y for Def't in Error.

Copy.

Know all men by these presents, that we, The Dubuque and Pacific Railroad Company, as principals, and C. H. Booth as surety, are held and firmly bound unto Edwin C. Litchfield in the full and just sum of one thousand dollars, to be paid to the said Edwin C. Litchfield, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twenty-eighth day of October, (1859,) in the year of our Lord one thousand eight hundred and fifty-nine.

Whereas lately, at a district court of the United States for the district of Iowa, northern division, in a suit depending in said court between Edwin C. Litchfield, as plaintiff, and The Dubuque and Pacific Railroad Company as defendants, was rendered against the said The Dubuque and Pacific Railroad Company, and the said The Dubuque and Pacific Railroad Company having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Edwin C. Litchfield citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

Now the condition of the above obligation is such, that if the said The Dubuque and Pacific Railroad Company shall prosecute their writ of error to effect, and answer all damages and costs if

hey fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

The DUBUQUE AND PACIFIC RAILROAD COMPANY,
By the hand of their sec'y and att'y, (with corporate seal,)
JAMES M. McKINLAY, [SEAL.]
C. H. BOOTH. [SEAL.]

Approved by J. M. LOVE,
Judge U. S. Court.

Declaration in Right.

STATE OF IOWA, *ss.*

In the District Court of the United States for said State, northern division.

EDWIN C. LITCHFIELD
vs.
THE DUBUQUE AND PACIFIC RAILROAD COMPANY.

The plaintiff, who is a citizen of the State of New York, now residing in that State, claims of the defendant, a citizen of the State of Iowa, that is to say, a corporation duly organized under the laws of that State, and having its location and principal place of business in Dubuque, which is in the northern judicial division of said State, the immediate possession of section one (1) in township eighty-eight (88) north, range twenty-nine (29) west, of the fifth principal meridian, and lying in the said northern division of the State of Iowa, and for cause of claim states that he is the owner in fee simple of said tract of land, which is the fair value of more than two thousand dollars, and that he is entitled to the immediate possession thereof. Yet the said defendant has taken possession of the said tract of land, and still holds the same, and though often requested to deliver possession thereof to said plaintiff, still refuses so to do, to his damage two thousand dollars, and therefore he sues.

CHS. MASON,
Att'y for Plaintiff.

Filed Oct. 25th, '59.

J. C. BURNS, *Cl'k.*
By W. WIRT MILLS, *Dep'y.*

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W. W. MILLS.

Plea.

In United States District Court, District of Iowa, northern division—October Term, 1859.

EDWIN C. LITCHFIELD
vs.
D. & P. R. R. Co.

The defendants deny the right of plaintiff to the tract of land with the appurtenances, and damages for the detention thereof, as set forth in his declaration, or to any part thereof, and hereupon pray a jury (or trial by the court in lieu of a jury) to determine the truth of the plea.

PLATT SMITH and
JAMES M. McKINLAY,
Att'ys for Def'nt.

Filed Oct. 25th, '59.

J. C. BURNS, *Cl'k.*
By W. WIRT MILLS, *Dep'y.*

In the District Court of the United States for the district of Iowa, northern division—Oct. Term, 1859.

EDWIN C. LITCHFIELD
vs.
THE DUBUQUE AND PACIFIC R. R. COMPANY.

Cause submitted without a jury on the following

Agreed Statement of Facts.

On the eighth of August, 1846, the Congress of the United States passed the following act:

"An act granting certain lands to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines river, in said Territory."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, granted to the Territory of Iowa, for the purpose of aiding said Territory to improve the navigation of the Des Moines river from its mouth to the Racoon fork (so called) in said Territory, one equal moiety, in alternate sections, of the public lands, (remaining unsold, and not otherwise disposed of, incumbered, or appropriated,) in a strip five miles in width on each side of said river, to be selected within said Territory by an agent or agents to be appointed by the governor thereof, subject to the approval of the Secretary of the Treasury of the United States.

Section 2. And be it further enacted, That the lands hereby granted shall not be conveyed or disposed of by said Territory, nor by any State to be formed out of the same, except as said im-

provements shall progress; that is, the said Territory or State may sell so much of said lands as shall produce the sum of thirty thousand dollars, and then the sales shall cease until the governor of said Territory or State shall certify the fact to the President of the United States that one-half of said sum has been expended upon said improvements, when the said Territory or State may sell and convey a quantity of the residue of said lands sufficient to replace the amount expended, and thus the sales shall progress as the proceeds thereof shall be expended, and the fact of such expenditure shall be certified as aforesaid.

Sec. 3. And be it further enacted, That the said river Des Moines shall be and forever remain a public highway for the use of the government of the United States, free from any toll or other charge whatever for any property of the United States, or person in their service, passing through or along the same: Provided always, That it shall not be competent for the said Territory or future State of Iowa to dispose of said lands, or any of them, at a price lower than, for the time being, shall be the minimum price of other public lands.

Sec. 4th. And be it further enacted, That whenever the Territory of Iowa shall be admitted into the Union as a State, the lands hereby granted for the above purpose shall be and become the property of said State for the purpose contemplated in this act, and no other: Provided, The legislature of State Iowa shall accept the said grant for the said purpose.

Approved August 8th, 1846.

This grant was fully accepted by a resolution of the general assembly, passed Jan. 9th, 1847, and everything done on the part of the State to perfect the title under the act.

Agents were afterwards duly appointed by the governor of the State, who selected the sections designated by "odd numbers" throughout the whole extent of the grant. (The selection by "odd numbers" was approved by the Secretary of the Treasury.)

The lands now in controversy lie within five miles of the Des Moines river, and within the limits of what was the Territory of Iowa, on the 8th day of August, 1846, but not between the Racoon fork and the mouth of the river; they are also within six miles of the Dubuque and Pacific R. R. The present plaintiff holds by a title derived from the State as trustee of the Des Moines River fund. If, under all the circumstances of the case, the grant extends above the Racoon fork, the plaintiff's title is complete and he should recover, otherwise not. The land in controversy is worth more than $2,000, two thousand dollars.

On the 24th of February, 1847, the general assembly of the State of Iowa provided for the election of a Board of Public Works, consisting of a president, secretary and treasurer. To this board the whole subject of receiving and managing the lands and provi-

ding for the construction of the improvement was committed. On the (2d) second of August, (1847,) eighteen hundred and forty-seven, the board was duly elected, and was fully organized, and went into operation on the (22d) twenty-second of September following. On the (23d) twenty-third of February, (1848,) eighteen hundred and forty-eight, the Commissioner of the General Land Office wrote to the Board of Public Works as follows:

GENERAL LAND OFFICE,
February 23d, 1848.

SIR: Your communication of the 29th of November last, enclosing a copy of yours of the 22d of September last, has been received, and would have received an earlier response, but for the erroneous and defective surveys along the Des Moines river, which prevented this office from submitting to the Secretary of the Treasury, the selections made by the State of Iowa for the improvement of the navigation of that river, under the act of the 8th of August, 1846. As these surveys have been corrected, action will be had on those selections as soon as possible, and when approved they will be certified to you.

It is not usual to furnish more than a diagram of the grant, in cases of this kind, with a certified list of the tracts granted as above mentioned, and these will, of course, be transmitted as soon as they can be prepared.

All the aid that this office can give the Board of Public Works in the discharge of its duties, will be cherfully rendered; and if it is possible to procure copies of the reports of the Topographical Bureau of the examinations heretofore made of the Des Moines river, it will afford me pleasure to do so, and forward them to you.

A question has arisen as to the extent of the grant made to Iowa by the act of 8th of August, 1846, and the opinion of this office has been requested on that point.

By the terms of the law, the grant is of one equal moiety in alternate sections of the public lands remaining unsold, and not otherwise disposed of, incumbered or appropriated, in a strip of five miles in width on each side of said river, to be selected within said Territory, &c. &c., and the proceeds are to be applied in the improvement of the navigation of that river, from its mouth to the Racoon forks. Hence the State is entitled to the alternate sections within five miles of the Des Moines river, throughout the whole extent of that river, within the limits of Iowa.

Very respectfully, your obedient servant,
RICHARD M. YOUNG,
Commissioner.

CHARLES CORKERY, Esq.,
Secretary of Bd. of Public Works, Fairfield, Iowa.

On the (19th) nineteenth of June, (1848,) eighteen hundred and forty-eight, without any notice of a change of opinion, a proclamation was issued, signed by the President, and countersigned by the Commissioner of the General Land Office, ordering into the market some of the lands which lay above the Racoon forks, and which would belong to the State according to the rule laid down in the aforesaid letter of the (23d) twenty-third of February, (1848,) eighteen hundred and forty-eight. The sale was to take place on the (16th) sixteenth of October, 1848.

On the (18th) eighteenth of September, (1848,) eighteen hundred and forty-eight, the Board of Public Works, through its secretary, wrote to the Commissioner of the General Land Office as follows:

OFFICE OF THE BOARD OF PUBLIC WORKS,
Keokuk, Iowa, 18th Sept., 1848.

SIR: The attention of this office has been called to the proclamation of the President of the United States, bearing date the 19th of June last, for the sale of lands in Iowa, by which I perceive that lands donated to this State, for the improvement of the Des Moines river, are to be offered for sale at Iowa City, on Monday, the 16th October next; these lands are situated above the Racoon forks of the Des Moines river, in township Nos. 79, 80, range Nos. 25, 26, &c., and a sale by the United States will be in conflict with your opinion, expressed to me in your letter of the 23d of February last, in which you say that "the State is entitled to the alternate sections within five miles of the Des Moines river, throughout the whole extent of that river, within the limits of Iowa."

Your very liberal opinion has influenced this board to place sixty miles of the contemplated improvement under contract, in addition to the thirty miles first let, and the State would now be greatly embarrassed by any impediments to her favorable prospects in this regard. We believe that the fact of having those lands embraced in the proclamation was an oversight, without any intentions to curtail the resources of the State, and that it will be corrected on being discovered.

Very respectfully, your obedient servant,
CHAS. CORKERY,
Sec. Board P. Works.

Hon. R. M. YOUNG,
Com'r of G. L. O.

To this letter no reply was returned.

On the same day the following protest was sent to the land office at which the sale was ordered to take place, for the purpose of being filed therein:

OFFICE OF THE B'D OF P. WORKS,
Keokuk, Iowa, 18th Sept., 1848.

SIR: I enclose you a copy of a letter which I have transmitted by this day's mail to the Commissioner of the Gen'l Land Office, and take this opportunity of protesting against the sale of the lands therein referred to.

This protest is based not only on the act of Congress donating lands to the State of Iowa, for the improvement of the Des Moines river, but also on the decision of the Com'r of the Gen'l Land Office, bearing date 23d of February, 1848, in words as follows:

"A question has arisen as to the extent of the grant made to Iowa by the act of 8th of August, 1846, and the opinion of the office has been requested on that point. By the terms of the law the grant is of one equal moiety, in alternate sections of the public lands remaining unsold and not otherwise disposed of, incumbered or appropriated, in a strip five miles in width on each side of the said river, to be selected within said Territory, &c.; and the proceeds are to be applied in the improvements of the navigation of said river, from its mouth to the Racoon fork. Hence, the State is entitled to the alternate sections within five miles of the Des Moines river, throughout the whole extent of that river, within the limits of Iowa."

As this board has had no information that this opinion has been rescinded, we are of the opinion that he will inform you on the subject within the two weeks prescribed for the continuance of the sale.

Respectfully,
CHAS. CORKERY,
Sec. B. P. W.

C. NEELY, Esq., *Register.*

The following letter was written by the Senators and Representatives of Iowa, on the day of its date:

CONGRESS, *Jan. 8th*, 1849.

SIR: During the past summer we were much surprised to see lands proclaimed for sale by the President of the United States which had been declared by the General Land Office, and considered by the people of Iowa, as the property of that State, under the act of 8th of August, 1846, "granting certain lands to the Ter. of Iowa, to aid in the improvement of the navigation of the Des Moines river, in said Territory."

On inquiring of the Commissioner of the General Land Office, as to the reasons for this course, he informed us that he had changed his original opinion as to the extent of this grant, and was now inclined to think that it was limited to the Racoon fork;

but no official promulgation of this opinion has yet been given, except negatively, by proclaiming the lands, as above mentioned.

The granting clause in the act of August 8th, 1846, is so clear, that we are constrained, by a due regard to the interests of the people and State of Iowa, to ask your consideration of the subject; and we are further encouraged to take this course, as the Commissioner, we are assured, will be pleased to extend to the State the full complement of the grant, if the law, in your opinion, should bear that construction. This act of 8th August, 1846, is found in the acts of the first session 29th Congress, page 115.

The first part of the first section designates the object for which the grant was made, to wit: "There shall be, and hereby is, granted to the Territory of Iowa, for the purpose of aiding said Territory to improve the navigation of the Des Moines river, from its mouth to the Racoon fork, (so called,) in said Territory."

The next clause describes the grant and its extent, to wit: "one equal moiety, in alternate sections, of the public lands, (remaining unsold and not otherwise disposed of, encumbered or appropriated,) in a strip five miles in width on each side of said river."

This language is so plain, that the extent of the grant is a self-evident proposition, and requires no argument. But the idea is entertained that the improvement governs the extent of the grant. This construction, we beg leave to state, has never obtained. Grants have frequently been made for seats of government, county sites, and the erection of public buildings; but in no case has it been contended that the object of the grant governs the extent of it; otherwise, the act passed by Congress on the same day with that now under consideration, (page 140,) "to grant a certain quantity of land to aid in the improvement of the Fox and Wisconsin rivers, and to connect the same by a canal, in the Territory of Wisconsin," must be construed as running the whole length of the Wisconsin river also, as the limitation of that grant to the Fox river, the lakes through which it passes, and the canal, is not more specific than the terms used to designate the grant for the improvement of the Des Moines river.

The reason for this extension of the grant to Iowa, above the terminus of the improvement, is moreover manifest, because near the mouth of the river that improvement will be very expensive, and there the grant does not attach, because the lands on the Missouri side of the river, below Sullivan's line, are in Missouri, and those on the Iowa side are the property of individuals; and further, most of the lands some distance up the Des Moines have been sold by the government, and as the grant is only of the unsold and unappropriated lands in the alternate sections, the only equivalent for those which had been sold that could be given are the vacant lands far in the interior, from the Mississippi, and hence the terms used in the law.

As the terms of the act, then, are so clear and explicit, and as the reasons for the extensions of the grant, as provided by that act, are so obvious, we respectfully request, in our own behalf, and in behalf of the State and her citizens, who look with that confidence heretofore so fully justified, that you will not withhold the munificence of Congress, and thus cripple this young and rising State in her first great enterprise, and thus involve her in inextricable debt and difficulty. We earnestly request that you will give the necessary instructions for the selections and approval of these lands, along the entire route of the Des Moines, as contemplated by the law, as fast as the surveys are made and returned, and that the lands which belong to the State, which have been inadvertently offered, and which remain unsold, may be withdrawn from the market and certified to the State also.

We have the honor to be, with great respect, your obedient servants,

A. C. DODGE,
GEORGE W. JONES,
SHEP'D LEFFLER,
WM. THOMPSON.

Hon. R. J. WALKER,
Sec. of the Treasury.

The following was the response of the Secretary:

TREASURY DEPARTMENT, *March* 2, 1849.

GENTLEMEN: I have the honor to acknowledge the receipt of your communication of 8th of January last, and accompanying papers, on the construction of the act of Congress "granting lands to the Territory of Iowa, to aid in the improvement of the navigation of the Des Moines river in said Territory," approved 8th August, 1846. I concur with you in the views contained in your communication, and am of the opinion that the grant in question extends, as therein stated, on both sides of the river from its source to its mouth, but not to lands on the river, in the State of Missouri. I have transmitted your communication and accompanying papers, with a copy of this letter, to the Commissioner of the General Land Office.

I have the honor, &c.,
R. J. WALKER,
Sec. of Treasury.

Messrs. A. C. DODGE,
G. W. JONES,
L. LEFFLER,
W. THOMPSON.

On the same day the Secretary transmitted a copy of the above letter to the Commissioner of the General Land Office, with the following order:

TREASURY DEPARTMENT, *March 2d*, 1849.

SIR: For your information and government on the subject to which it refers, I enclose a copy of a letter addressed by me under this date to members in both houses of Congress from the State of Iowa, with reference to the construction of the act of 8th of August, 1846, granting certain lands to the Territory of Iowa, to aid in the improvement of the navigation of the Des Moines river. I also enclose a letter to which the within is a reply, and accompanying papers.

Very respectfully,
R. J. WALKER.

R. M. YOUNG,
Commissioner.

On the 1st of June, (1849) eighteen hundred and forty-nine, the Commissioner of the General Land Office wrote as follows to the land office at Iowa City:

GENERAL LAND OFFICE, *June 1st*, 1849.

GENTLEMEN: The Secretary of the Treasury having decided that the grant to the State of Iowa, under the act of the 8th of Aug., 1846, extended along the Des Moines river to its source, and that it did not stop at the Racoon forks, as this office had previously decided, you are hereby directed to withhold from sale all lands situated in the odd numbered sections, within five miles on each side of that river, above the Racoon forks. Enclosed I send you a diagram upon which the State selections above that point are colored yellow.

I have also to request that you will make out a list showing the sales and locations which have been made within these selections, as it is designed to endeavor to procure some legislative action on the part of Congress confirmatory of them. The diagram enclosed extends to 83 N. 26, W., being as far as the surveys have progressed in that direction.

I am, very respectfully, your ob't serv't,
R. M. YOUNG, *Com'r.*

REGISTER and RECEIVER,
Iowa City, Iowa.

On the nineteenth of December, 1849, the following letter was written by the Commissioner of the Gen'l Land Office to Jesse Williams, esq., the then secretary of the Bd. of Public Works.

GENERAL LAND OFFICE, *December 19th*, 1849.

SIR: A letter has been received at this office from the Hon. A. C. Dodge, and the Hon. Geo. W. Jones, enclosing one from you to the former, dated the 30th ult., requesting that you may be furnished with "a list of the Des Moines River grant above the

Racoon forks." In reply I have to state that said list has not been furnished, for the reason that the posting of the land warrants in the Iowa City district was not completed on the books of this office until recently. Said list is now in the course of preparation, and will be ready for transmission at an early day. In the latter part of your letter you say, "the lists heretofore forwarded of land below the forks have been furnished the Secretary of State, instead of the board, who are the rightful and only agents of the State for said land." In the absence of evidence, showing the right of another to receive confirmed lists of State grants, it is usual to send them to the Secretary of State; such is the case at present in relation to this grant. If, however, you will furnish this office with evidence as to your right, as secretary of the Board of Public Works, to receive said lists, and to correspond with this office in relation thereto, they will hereafter receive the desired direction.

I am, sir, your ob't serv't,

J. BUTTERFIELD,
Commissioner.

JESSE WILLIAMS, Esq.,
Iowa City, Iowa.

On the 14th of Jan., 1850, the Commissioner of the Gen'l Land Office made a report to the Secretary of the Interior, of the amount of land which had been granted to the several States respectively for internal improvements.

The amount charged against Iowa in the list is 825,078 acres, and the following note is thereto appended: "This amount, in accordance with the decision of the Secretary of the Treasury, of the 2d of March, (1849) eighteen hundred and forty-nine, will be increased by the unadjusted portion of the grant for the improvement of the Des Moines river, situated between the Racoon fork and the source of said river, estimated to contain about 900,000 acres."

On the 13th of March, 1850, the Commissioner of the General Land Office submitted to the Secretary of the Interior three several lists of land, the first of which had the following heading:

"No. 1, showing the tracts falling within the limits of the Des Moines grant above the Racoon fork, &c., under the decision of the Sec'y of the Treasury of March 2d, 1849."

On the 6th of April, 1850, the Secretary of the Interior, who now had the supervision of the Gen'l Land Office, made the following decision:

DEPARTMENT OF THE INTERIOR,
Washington, April 6th, 1850.

SIR: Having considered the question submitted to me, connected with the claim of the State of Iowa, to select, under the act of Au-

gust 8th, 1846, lands for the improvement of the Des Moines river, I am clearly of the opinion that you cannot recognise the grant as extending above the Racoon forks, without the aid of an explanatory act of Congress. It is clear to my mind, from the language of the act of August 8th, 1846, itself, that it was not the intent of the act to extend it further. My construction is confirmed by the report of the committee and the accompanying papers. If in any report to Congress you have recognised the grant as extending to the source of the river, it will be proper to correct it, that Congress, if they see fit, may extend the grant. The opinion expressed by the late Secretary of the Treasury, on the subject, is entitled to great respect, but I cannot concur in it, and the law not having been carried into effect by him, his opinion merely expressed is open for reversion.

The lists of selections, and other papers, submitted with your letter of the 13th ultimo, are herewith returned.

As Congress is now in session, and may take action on the subject, it will be proper, in my opinion, to postpone any immediate steps for bringing into market the lands embraced in the State's selections.

I am, sir, very respectfully, your ob't serv't,

T. EWING, *Secretary.*

The COMMISSIONER OF THE GEN'L LAND OFFICE.

On the 14th of April, 1850, the Senators and Representatives of Iowa protested against this decision, and appealed therefrom to the President. He referred the matter to the Att'y General, (Mr. Johnson,) who, on the 19th July, 1850, made his report, giving it fully as his opinion that, by terms of the grant itself, it extended along the Des Moines river, up to its very source.

Previous to the promulgation of this opinion, President Taylor died, and a new Cabinet was formed not long afterwards, and before any further action was taken upon this matter. Instead of giving effect to the opinion of Mr. Johnson, the question was submitted anew to the Att'y General, (Mr. Crittenden,) who, on the 30th of June, 1851, decided that, in his opinion, the grant did not extend above the Racoon fork.

The Secretary of the Interior, Alex. H. H. Stuart, at first (26th July, 1851) concurred in this opinion, but afterwards consented to bring the whole matter before the President and Cabinet, who made a decision, as indicated in the following letter:

DEPARTMENT OF THE INTERIOR,
Washington, Oct. 29th, 1851.

SIR: I herewith return all the papers in the Des Moines case, which were recalled from your office about the first of the present month. I have reconsidered and carefully reviewed my decision

of the 26th of July last, and in doing so, find that no decision which I can make will be final, as the question involved partakes more of a judicial than of an executive character, which must ultimately be determined by the judicial tribunals of the country; and although my own opinion on the true construction of the grant is unchanged, yet, in view of the great conflict of opinion among the executive officers of the government, and also in view of the opinion of several eminent jurists, which have been presented to me in favor of the construction contended for by the State, I am willing to recognise the claim of the State and to approve the selections, without prejudice to the rights, if any there be, of other parties, thus leaving the question as to the proper construction of the statute entirely open to the action of the judiciary.

You will please, therefore, as soon as may be practicable, submit for my approval such lists as have been prepared, and proceed to report, for like approval, lists of the alternate sections claimed by the State of Iowa above the Racoon fork, as far as the surveys have progressed, or may hereafter be completed and returned.

I am, sir, very respectfully, your obedient serv't,

ALEX. H. H. STUART,
Secretary.

To the COMMISSIONER OF THE GEN'L LAND OFFICE.

On the following day three lists of lands were prepared in the Gen'l Land Office, the heading of which will show their respective purposes, and are as follows:

List No. 1, "showing the tracts falling within the limits of the Des Moines grant, above the Racoon forks of the Des Moines river, so far as the surveys have extended, under the decision of the Sec'y of the Treasury of 2d of March, 1849, that such grant extended to the north boundary of the State."

List No. 2, showing tracts disposed of within those limits, in the interval between the date of one of the previous orders limiting the grant and one of those extending it above the forks.

List No. 3, showing the vacant lands subject to the claim of the State. The third of these lists was presented to the Secretary of the Interior for his approval, to which he appended the following explanatory statement:

DEPARTMENT OF THE INTERIOR,
Oct. 30th, 1851.

The selections embraced in the within list (No. 3) are hereby approved, in accordance with the views expressed in my letter of the 29th inst. to the Commissioner of the Gen'l Land Office, subject to any rights which may have existed at the time the selections were made known at the land office by the agents of the State, it being expressly understood that this approval conveys to the State

no title to any tract or tracts which may have been sold or otherwise disposed of, prior to the receipt by the local land officers of the letter of the Commissioner of the Gen'l Land Office, communicating the decision of Mr. Secretary Walker, to the effect that the grant extended above the Racoon fork.

ALEX. H. H. STUART, *Secretary.*

The following amounts of land were, at different times, approved and certified to the State of Iowa, under this grant, all lying above the Racoon fork:

October 30th, 1851	214,391.58	acres.
March 10th, 1852	143,908.37	"
December 17th, 1853	33,142.43	"
Do. 30th, do.	12,813.51	"
	404,255.89	"

The following is the heading of the list, which was approved by the Secretary of the Interior on the 17th of December, 1853, together with the terms of approval; a similar heading and approval were appended to the list, approved on the 30th of the same month: "A list showing the vacant lands in the odd numbered sections above the Racoon forks, and within five miles of the Des Moines river, so far as the surveys have progressed, falling to the State of Iowa, under the act of the 8th of August, 1846, as construed by the Secretary of the Treasury in his letter of the 2d of March, 1849, and of the Secretary of the Interior, of the 29th of October, 1851, which have not heretofore been approved."

Which list was approved in these words:

DEPARTMENT OF THE INTERIOR,
December 17th, 1853.

The selections in the within list are hereby approved to the State of Iowa, under the act of the 8th of August, 1846, without prejudice to the rights, if any there be, of other parties.

R. McCLELLAND,
Secretary.

The following communication was addressed by the Secretary of the Interior to the Commissioner of the General Land Office, on the day of its date:

DEPARTMENT OF THE INTERIOR,
Washington, Aug. 23d, 1852.

SIR: I have examined the question involved in the appeal of the Honorable A. C. Dodge, George W. Jones, and Bernhart Henn, of Iowa, from the judgment of the Commissioner of the General Land Office, in relation to their application for the issue of patents

on the sales and locations of portions of the odd numbered sections along the Des Moines river, above the Racoon forks, which had been made prior to the receipt by the district land officers of Mr. Secretary Walker's decision of the 2d of March, 1849, and have to state that, as I approved the selections above the Racoon fork, with the express understanding that that approval should not convey to the State any title to tracts which might have been sold or otherwise disposed of prior to the receipt of Mr. Walker's decision, the issuing of patents on the sales and locations in question is in perfect accordance with the views expressed in my letter to the Commissioner of the 29th of October last, and the terms of approval of the selections on the following day.

I am, sir, very respect'y, your ob't serv't,

ALEX. H. H. STUART,

Secretary.

The ACTING COMMISSIONER OF THE GEN'L LAND OFFICE.

On the 6th of January, 1854, the Commissioner of the General Land Office wrote to the superintendent of public *institutions* of the State of Iowa, as follows:

GENERAL LAND OFFICE,

January 6th, 1854.

SIR: Herewith I enclose a copy of a list of laws falling to the State of Iowa, under the act of 8th of August, 1846, selected by the State under the 8th section of the act of 4th Sept., 1841, and approved before the grant, for the improvement of the Des Moines river, was adjusted as far as the township embraced by the lists, which was approved by the Secretary of the Interior on the 30th ultimo. The quantity of land thus approved under the act 8th of August, 1846, is twelve thousand eight hundred thirteen and fifty-one hundredths of an acre (12,813.51). These lands were selected on the 20th July, 1850, and embraced by lists Nos. 49 to 54, inclusive, and in lieu thereof the State is entitled to select an equal quantity elsewhere.

Be pleased to acknowledge the receipt of this communication.

I am, very respectfully, your ob't serv't,

JOHN WILSON,

Commissioner.

THOMAS H. BENTON, JR., Esq.,

Superintendent of Public Instruction, Iowa City, Iowa.

In explanation of the foregoing letter, it is admitted that the act of 4th of Sept., 1841, referred to, gave to each of the new States 500,000 acres of land on its coming into the Union. In Iowa this land was devoted to educational purposes. The amount of 12,813.51 acres had been selected as a portion of this grant from

among the odd numbered sections of land lying within five miles of the Des Moines river and above the Racoon fork; and, according to the construction of the act of August 8th, 1846, which prevailed when this letter of January 6th, 1854, was written, this land which had been so selected for the school fund had been previously appropriated by Congress to the Des Moines river fund. The superintendent of public instruction was therefore informed that the State was entitled to select an equal quantity of land elsewhere, in lieu of this amount which had been erroneously selected for school purposes.

On the 21st of March, 1856, the Commissioner of the General Land Office decided that the grant was limited to the Racoon fork. The matter was then brought anew before the Secretary of the Interior, and was by him referred to the Attorney General.

On the 29th of May, 1856, the Attorney General, after a statement of the facts of the case, proceeds as follows to his conclusions:

On these facts you present the following questions, namely:

1st. Whether the decision of Mr. Stuart, and the consequent action of the department, down to the present time, are conclusive in favor of the claim of the State of Iowa?

2d. Whether, if it be an open question, the grant extends, in my opinion, above the Racoon fork?

3d. Whether it is to be considered as reaching into the Territory of Minnesota?

I proceed to state such views as occur to me on the whole subject, to be applied afterwards to the particular questions which you propounded. I suppose it must be conceded that an opinion of the Attorney Gen'l is not conclusive; that is, it is not compulsory on the President, or even on a head of department.

It is inconvenient, however, to have conflict of opinion between the Attorney Gen'l and a head of department; and that inconvenience is placed in the strongest light by the facts of this case, when the affirmative opinion of one Attorney Gen'l went disregarded by one Secretary, and a negative opinion of another Att'y Gen'l by the succeeding Secretary. There could be no more flagrant example of confusion of opinion and action.

A Secretary, undoubtedly, is entitled to have and to act upon his conscientious opinion of a question, even after he has taken the opinion of the Att'y Gen'l, but the interest of parties and the credit of the government require decision; and it would seem that any such conflict of opinion between the Secretary asking, and the Att'y Gen'l giving official advice, should be referred at once to their common superior, the President, in order that the particular question of administration itself may receive the authoritative decision of the Executive department. That did not happen in this case in either of its stages; and thus all the embarrassment of contra-

dicting opinions and acts, with the uncertainty of present duty which they create, are transmitted to you for determination.

Is it necessary now for me to weigh the reasons of Mr. Crittenden against the reasons assigned by Mr. Johnson, and conclude which of them shall be overruled by me? That would be an unwelcome task. It must be admitted, on the mass of argument before me, that there are two sides to the question of the true legal intendment of the act of Congress. At the same time it is due to frankness to say, that if constrained to judge between them, the inclinations of my mind would be to the side accepted by Mr. Crittenden, because the language of the statute admits of such construction, and because, on the retrospect of the history of the case, it is impossible for me to doubt as to the actual intentions of Congress; that is, if the question were one of new impression, the tendency of my judgment would be to say, that the grant is limited to the line of the improvements; namely, the river of Des Moines, below the Racoon fork.

But it is not a question of new impression; nay, it has passed beyond opinion into action, and at this point of time it is more material to consider what has been done than what has been thought on the subject-matter. I wish, if possible, to find something firm to stand upon in what has been done.

In so far as regards selections already approved, whether by yourself or by Mr. Stuart, it is clear that the government cannot undo that. What Mr. Stuart did, in this respect, with deliberation, what you did, without the questions involved being suggested to you, was, in each case, done by the competent legal authority, and binds the government. One Secretary has no more lawful power to undo a thing lawfully done by his predecessor in a matter of grant, than in a matter of account; no more right where a settlement is in favor of a third party, than where it is in favor of the United States. When a thing is decided and done by the head of a department, acting within the scope of his lawful authority, it can be revised by his successor only on the ground of mistake in a matter of fact, or the discovery and production of material new testimony. (Mr. Crittenden's opinion of December 28, 1852, MS.; see also Bank of Metropolis vs. The United States, xv Peters, p. 400; ex parte Randolph, ii Brooker, p. 470.)

If the acts of Mr. Stuart and yourself, in this respect, had undertaken (as they do not) to dispose of any contending rights of third parties, the latter would *of* had their remedy at law. But what you have done is final, as respects the United States. But have you erred in continuing to follow the line of action which your predecessor had prescribed, and which Commissioner of Public Lands assumed as settled, in presenting to you for approval, lists made out on the premises of the subsisting decision of Mr. Stuart? And if you erred (inadvertently) in thus approving selections

made by the State above the Racoon fork, shall you now stop and change the rule of action which Mr. Stuart has prescribed to the Commissioner? The answer to these questions is not included in the preceding conclusions. It is one thing to undo an act done, and quite another thing to cease to persevere in a previous line of action, as to acts of a continuous nature.

It might with much plausibility be argued, that while Mr. Walker's order was an opinion merely, and did not bind Mr. Ewing, so what Mr. Stuart did, though final as to lands actually approved, was but a precedent, when a new list comes up, and may be rejected by you as a precedent, though it cannot be reversed or annulled as an act; that the disposition of the particular lands made by him is irrevocable, but the principle on which he did it is open to re-examination, as respects any other lands in the same right claimed by the State, and that, in executing the same law, you are to execute it according to your own understanding of its force and effect. That may be so, and yet the contingency is not exactly of the application of a precedent to a new case; for the grant to Iowa is one thing, although it be composed of parts, or of new sets of parcels appertaining to the general whole. Mr. Stuart decided to adopt the opinion of Mr. Walker, which carried the grant above the Racoon fork; and he proceeded to execute, and did execute, that decision in part. And the true question is, of the completion of the execution by you of what had been partially executed by Mr. Stuart. I think it must be a clear case of manifest illegality, in the work commenced and half executed by one Secretary, to justify the abandonment of it by his successor. Is the present such a case of palpable violation of law? That cannot be pretended in face of the opinions of Mr. Walker and Mr. Johnson, and the administrative acquiescence in those opinions on the part of Mr. Stuart. In my judgment, it is not for the good of the public service, while it is prejudicial, and sometimes grossly unjust to private interests concerned, for the Executive to break off things half done, because of mere doubts of the legality of the decisions upon which commencement was made, or even the belief, that upon better reflection at the outset, a different decision would have been rendered. To indulge in such oscillation of action, under the influence of ordinary causes of perturbation, is not seemly on the part of the government.

In the present case of lands above the Racoon fork, claimable by the State within its limits, twenty-six fifty-sixth parts, nearly half, the United States have already recognised as belonging to the State. I think you may, if you choose, well consider that a determination of the question proper to be acquiesced in by you as a settled fact of administration.

But this conclusion is placed by me on the ground only of a decision by Mr. Stuart, proper to be accepted by his successor, as con-

stituting final action of the government. It has been suggested in argument that inferences in favor of the present claim of the State may de deduced from a clause in the recent act making a grant of lands to the State of Iowa to aid in the construction of certain railroads in that State, (May 16, 1856.) The words are:

"That any and all lands heretofore reserved to the United States by an act of Congress, or in any manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever, be, and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States."

This provision is rather doubtfully worded. I suppose it intends to enact that the alternate sections reserved to the United States, for the sake of augmented sale-value, in case of any previous grants to the State for State objects, shall continue to be so reserved now, and shall not be taken as part of the lands subject to present grants to the State; and if the title still remains in the United States, the right of way is to be passed upon by the President of the United States.

Such an act of the President would apply still more distinctly to any case of actual continuing reservation to the United States for the uses of the United States. Concluding, at any rate, that the general object is to protect the rights of the United States in any such case, if it exists, it is urged that such a provision would have been superfluous, had not the Des Moines grant extended above the Racoon fork.

Well, suppose a construction which makes it superfluous. What then? There are very many superfluous provisions in the statutes. Of course no very cogent argument can be derived from that consideration. Moreover, if it was expressly said in the provision that the Des Moines grant was intended, still it would only operate as enactment ex. majori cantela, to guard against interferences in case the present controversy should be determined in favor of the State.

But the argument errs in supposing that no other grants of land have been made to the State of Iowa for the purpose of aiding in objects of internal improvements, or for any other purpose whatever. Various other grants of land have been made from time to time to the State. (See exempli gratia, v Stat. at Large, pp. 453, 455; ibid. pp. 789, 790; vi Stat. at Large, p. 810.) In a word, Congress by this provision said: "We have already made several grants of land to Iowa for one purpose or another, which may or may not have been located, and we do not design by this act to undertake to do what, indeed, we could not do if we would;

that is, divest those grants from their lawful destination for the use of railroads, on account of which the present new grants are made to the State."

On the whole, therefore, it seems to me that this provision does not serve in any way to change the premises of the question, or the conclusions founded on those premises. Remains the question, on which of the two upper confluents of the Des Moines, the eastern or western, the land is to be taken. I conceive that point to be absolutely determined by the premises of my conclusions.

Mr. Walker's decision, as we have seen, was that the grant extends "on both sides of the river from its source to its mouth, but not into lands on the river in the State of Missouri."

Now the language of the act is explicit, granting to Iowa the alternate sections, "in a strip of five miles in width on each side of said river" Des Moines; and the improvement is, in the equally explicit terms of the act, "from its mouth to the Racoon fork." But while carrying the grant above the Racoon fork to the "source" of the Des Moines, where the improvement does not reach, he lops it off below, along the line of improvement, by excluding "lands on the river in the State of Missouri." The explanation of which is, for the last twenty-five miles of its course the river Des Moines is the dividing line between the States of Missouri and Iowa. Missouri enjoys directly all the benefits of the improvement of the navigation of the river, but no lands in Missouri are to be comprehended in the grant, notwithstanding its terms are of lands on each side of the river, for the obvious and sufficient reason that the act contains no provisions adequate to enable Iowa to take, hold and manage lands in the State of Missouri.

I conceive that the considerations which induced Mr. Walker to diminish by construction the scope of selections for twenty-five miles on one side of the river below the Racoon fork, show that in extending the grant above to the "source" of the Des Moines, he intended to confine it within the limits of the State of Iowa.

Such was the understanding of the subject which guided the action of Mr. Stuart; the lists which he approved expressly referring to the limit of the north boundary of the State. And that is the utmost point to which, in my judgment, you can lawfully go, in case you acquiesce in and accept as a rule for yourself the opinion of Mr. Walker and the action of Mr. Stuart.

They unquestionably had before them the map of the State in which the eastern branch of the Des Moines was alone depicted, taking its rise in a lake on the boundary line of Minnesota. If they had knowledge of any western branch of greater or less length, they treated the eastern branch as the true Des Moines.

I think they must *of* done so, because they could not have done otherwise. Mr. Walker did not say, and could not have said,

that the grant extends into Minnesota. If he had apprehended any such consequence of deciding that the grant extends above the Racoon fork, he could not have made this decision, but must have referred the State, as Mr. Ewing afterwards did, to Congress. That is plainly to be inferred from the consideration that the act of Congress cannot be executed, if it be so construed as to assume that the grant extends into Minnesota. It contains no provisions in virtue of which one State is to hold public domain within the limits of another State or inchoate State.

Impressed by the force of this consideration, Mr. Walker excluded from the purview of the grant the *sand* on one side of the river, for the length of twenty-five miles, though plainly comprehended by the letter of the act.

Of course it availed nothing to say, that when the grant was made, the part of Minnesota affected was included within the limits of the State of Iowa, and that therefore the letter of the law extends the grant beyond the northern line of the State. So, also, the letter of the law comprehends lands in Missouri. But the letter of the law, in the former case as well as in the latter, must yield to the legal objection, that without apt language of enactment to that express effect, it cannot *not* be inferred from other words of enactment that a grant of lands to one State extends into another State, (including in such phrase inchoate State.)

Moreover, we are not dealing with the import of the grant on its face, or as construed while Iowa was a Territory and included a part of the present Minnesota.

If we go back to that day, we find the grant construed and accepted on both sides as not extending above the Racoon fork, and of course not involving any possible question of the upper course of the Des Moines. If we now stood there, at that point of time, my decision in the case would be precisely the reverse of what it now is in effect, though precisely the same in form and tenor, that is to accept as final the previous action of the Executive, (including President Polk's proclamation,) which limited the grant to the Racoon fork. I should be the more fortified in such a conclusion, because the maxim stare decisis would then have applied to the case without qualification or doubt; and also because, if the naked question of the construction of the statute were before me, as it would then have been, my judgment would have been satisfied with the construction put upon it in that early stage of the case by the United States, and not objected to by the State.

While, at that time, the idea of acquiescing in the thing decided would have confined the grant to the Des Moines below the Racoon fork, the same idea requires that the grant, though carried by your predecessor above the Racoon fork, should yet be confined within the limits of the State of Iowa. That is the decision whose

authority is invoked as controlling you, and which, if you accept at all, you accept on the final decision of the whole matter.

If you throw up the decision of Mr. Stuart, founded on Mr. Walker's opinion; if you come to the conclusion that this is not to be acquiesced in as final administrative action; if you go behind it, then you come at once per saltam to the state of the question as it stood anterior to the 2d of March, 1849. At that point, we shall have all the arguments of *the* Mr. Attorney Gen'l Johnson in favor of the finality of executive action to counsel acquiescence in the then existing practical construction of the law. If, passing over this consideration, we proceed to reason about the meaning of the law, we do not have the advantage of the elaborate arguments on that point which have since been officially presented by Mr. Johnson, and also by Mr. Attorney General Crittenden. But all those arguments would possibly occur to us, and we might be the more easily brought to the same conclusion with the latter by fresher contemporaneous knowledge of the legislative history of the act of Congress.

In fine, after the most mature reflection, it seems to me that only two tenable alternatives present themselves in the case: one, to stand on the action of Mr. Walker and Mr. Stuart, not as legal doctrine, but as decision; and the other, rejecting all the intermediate vacillations of opinion, to go back to the original action, and stand on that as decision, and not as legal doctrine. Either of these conclusions would be perfectly advisable, according to the rules of law; for if it be unlawful to go behind executive decisions, then the last decision in the case was a violation of law, and should be rejected because of its illegality. I have hesitated much on the question whether that be not the true view of the subject, but, for reasons already suggested, have come to the conclusion, on the whole, to advise you to stand on the last decision, which gives to the State the lands along the course of the Des Moines up to the northern boundary of the State. There is a collateral consideration which has weight with me. It is discreditable to the government that its views of a law and its consequent action should be shifting about like a weather-vane, as they have done in this case. I wish, if it be possible, to stop that. I think the alternative lines of duty, either of which you may lawfully pursue, and beyond which there is no other apparently lawful course, indicate the means of producing the desirable result of now concluding the subject, in so far as regards the Executive.

I advise, therefore, that you propose to the State of Iowa and its assigns to acquiesce in and accept the decision of Mr. Stuart as final, and to approve selections accordingly, provided the State, or its assigns, will themselves agree to acquiesce in and accept that decision as final. If they refuse to treat that decision as final, they cannot expect you to do so. They should be bound if you

are. If they consent to enter into satisfactory stipulations of contract to that effect, you can with safety award to them the residue of the claim, up to the northern boundary of the State. If they decline this proposition, then it is clear, in my opinion, that you are completely discharged from any obligation to act on the premises of Mr. Walker and Mr. Stuart; nay, it becomes impossible for you to do so; for the very supposition of this alternative is that the State of Iowa denies the finality of the decision, that is, denies so far as regards her, it is a decision; and if not a decision for her, then it is not one for the United States.

In that event you are forcibly thrown back on the first decision of the government—that from which Mr. Walker departed—and must, in my opinion, absolutely refuse to approve any more selections above the Racoon fork; the effect of which would probably be to remit the parties to Congress, which alone has the full power to cut the Gordian knot in which this subject has been tangled up, by reason of the inexplicitness of the original act of Congress, and the uncertainties regarding its meaning, which have embarrassed the action of the successive administrators of the government.

I am, very respectfully,

C. CUSHING.

Hon. R. McCLELLAND,
Secretary of the Interior.

On the 9th of June, 1856, the Secretary of the Interior made the following communication to the Commissioner of the General Land Office:

DEPARTMENT OF THE INTERIOR,
June 9th, 1856.

SIR: I return herewith the papers in reference to the grant for the improvement of the Des Moines river, which accompanied your report of the 24th of March, and enclose therewith several letters and arguments which have been received here since the date of your report.

Having submitted the subject to the Attorney Gen'l for his opinion upon the questions involved, I enclose a copy of such opinion, furnished me under the date of the 29th ultimo, and also a letter, under date of the 5th inst., from the Hon. Reverdy Johnson, (the att'y for the claimants under the grant,) in regard to the conditions upon which subsequent approvals, up to the limits of the State of Iowa, are recommended by the Att'y Gen'l to be made.

In the subsequent action upon selections not yet approved, I have concluded to be governed by the advice of the Att'y Gen'l, as contained in the paragraph near the close of such opinion, beginning with the words, "I advise, therefore, that you propose to the State of Iowa and its assigns," and ending with, "you can with safety

award to them the residue of the claim up to the northern boundary of the State."

It will be perceived from the endorsement of Mr. Johnson's letter, above referred to, that he has undertaken to procure the assent of the State and its assigns to the conditions referred to, so that the necessity is obviated of any direct proposition to that effect on the part of the department; but no further action will be taken until the parties are heard from on this point.

In the certificate of approval, hereafter prepared for my signature on any lists submitted, the fact should be stated that, the approval being based on the prior action of the department, and upon the ground that the grant is to be confined to the northern boundary of the State of Iowa, the acceptance by the State and its assigns would be considered an acquiescence, on their part, in this limit, and an abandonment of all claim beyond it, as it is upon this basis alone I can feel justified in yielding my assent to the claim preferred.

Should the assent of the parties be given in writing, the certificate of approval will be so varied from the language above as to conform to that state of facts, but without losing sight of the real groundwork of my assent to the approval.

Respectfully, your ob't serv't,

R. McCLELLAND,
Secretary.

The Hon. THOMAS A. HENDRICKS,
Commissioner of the Gen'l Land Office.

The Board of Public Works not feeling authorized to enter into any compromise of that nature, brought the matter before the general assembly, and the following act was passed, which took effect on the 14th day of April, 1858:

An act appointing a commissioner to procure the lands granted for improving the navigation of the Des Moines river to be certified to the State.

Section 1. Be it enacted by the general assembly of the State of Iowa, That Charles Mason, of Des Moines county, is hereby appointed a commissioner, whose duty it shall be to do all acts in behalf of the State which may be necessary to procure the lands belonging to the grant made to the then Territory of Iowa, by an act of Congress approved August 8th, 1846, for the improvement of the navigation of the Des Moines river, in said Territory, to be certified and set apart to said State by the proper department of the gen'l government, and any act or agreement as to the amount of land to which the State may be entitled under said act of Congress, made or concluded by said agent, is hereby ratified and confirmed.

Sec. 2. That the State of Iowa shall not be liable in any manner for any damages growing out of any act or agreement of said agent hereby appointed, nor shall the State be held liable for any expense in any manner for the salary or per diem of said agent.

Sec. 3. This act to take effect and be in force immediately after its publication in the Iowa State Journal, and Iowa Weekly Citizen.

Approved March 22d, 1858.

The following correspondence then took place between the commission and the Secretary of the Interior:

WASHINGTON, *April 30th*, 1858.

SIR: In our recent conversation relative to the settlement of the controversy in regard to the extent of the Des Moines river grant, you expressed a readiness to abide by the proposition of your immediate predecessor, founded upon the opinion of the late Att'y Gen'l, dated May 29th, 1856. That proposition was, that the decision of Mr. Secretary Stuart of 29th Oct., 1851, founded on that of Mr. Walker's of March 2d, 1849, should be adopted as final and conclusive.

As agent for the State of Iowa, with full power over this subject, I am willing to accept this proposition thus far. But the late Att'y Gen'l has arrived at a conclusion that this rule will confine the grant to the present limits of the State of Iowa, and one branch of the proposition presented by your predecessor has accordingly been, that the State should relinquish all claim to lands north of her present boundaries. Fully satisfied that a fair interpretation of the decisions of Messrs. Walker and Stuart would lead to no such conclusion, and that the opinion of the late Att'y Gen'l in this respect was palpably erroneous, mainly in consequence of mistakes in regard to matters of fact, I desire this branch of the subject to remain open, and that I be permitted to show the truth of what I now state, in such a manner as you may think reasonable and proper.

The State of Iowa desires protection in all her just claims, and she will ask for nothing more. If upon a proper examination it be found that a fair construction of the decision of Mr. Stuart, founded on that of Mr. Walker's, will limit the grant to the present boundaries of the States, I will at once, on the part of the State, relinquish all claim to such lands as lie in Minnesota, and thus terminate this long controversy.

Yours, very respectfully,
CHAS. MASON,
Ag't and Att'y for Iowa.

Hon. JACOB THOMPSON,
Secretary of Interior.

DEPARTMENT OF THE INTERIOR,
Washington, May 7th, 1858.

SIR: I have to acknowledge the receipt of your communication of the 30th ultimo, relative to the settlement of the controversy as to the extent of the Des Moines river grant.

The decision of my immediate predecessor of the 9th June, 1856, I regard as a proposition made to the State of Iowa for a final adjustment, and your present communication is not an acceptance of the proposition on the part of the State, when it is considered that nearly two years have elapsed and no formal acceptance has, in the mean time, been presented here. If this be the only communication you have to make, I feel authorized to regard your letter now before me as an authoritative rejection of that proposition.

Very respectfully, your ob't serv't,
J. THOMPSON, *Secretary.*

Hon. CHARLES MASON,
Ag't for the State, present.

On the 10th of May, 1858, the following appeal was taken to the President of the United States, from the decision of the Secretary of the Interior:

Des Moines River grant.—Appeal from the Secretary of the Interior.

WASHINGTON, *May 10th*, 1858.

SIR: The undersigned by leave to present to your excellency the following statement of facts, and to ask your interposition to prevent what he believes an injury, which will otherwise be inflicted upon the State of Iowa.

On the 8th of August, 1846, a grant was made to the then Territory of Iowa, of lands lying along the Des Moines river, to aid in improving the navigation of a portion of that stream, upon certain terms and conditions therein set forth. These terms and conditions were assented to by the proper authorities of that Territory, and have ever since been strictly observed.

Shortly after the making of the grant, a difference of opinion arose as to its extent; some supposing it to reach no higher up the river than the Racoon fork, which limits the extent of the proposed improvement, while on our part it was held to extend to the source of the river.

In February, 1848, the Commissioner of the Gen'l Land Office informed the secretary of the Board of Public Works that the grant embraced "the alternate sections within five miles of the Des Moines river, throughout the whole extent of that river, within the limits of Iowa." (See extract of letter hereto appended, marked A.)

But in June of that year, for reasons unknown to the undersigned, a portion of the lands lying above the Racoon fork was

proclaimed for sale, and was actually offered at public auction in September following. A part of the lands so offered was sold on that day, and the remainder was, by law, subject to private entry afterwards.

To prevent these lands from being entered in this manner, the Board of Public Works remonstrated. Our delegation in Congress, soon after their arrival in Washington, in January, 1849, earnestly remonstrated and appealed from the decision of the Land Office to the head of the department, who, on the 2d of March following, decided broadly in favor of the State, holding that the grant extended to the source of the Des Moines river.

A copy of this decision was communicated to the Gen'l Land Office for its "information and government." (See copies of these documents hereto appended, marked B and C.)

This decision controlled the action of the Land Office for more than a year, till, in April, 1850, Mr. Ewing, the then Secretary of the Interior, reversed it, and limited the grant to the Racoon fork. From this decision an appeal was taken to the President. He referred the subject to Att'y Gen'l Johnson, who, on the 19th of July, 1850, decided in favor of the State; but just before that decision was promulgated, President Taylor died.

Under Mr. Filmore's administration the question again arose, and was referred by Mr. Secretary Stuart to Att'y Gen'l Crittenden, who coincided with Mr. Ewing in the opinion that the grant extended no higher than the Racoon fork. Mr. Stuart at first adopted this view of the matter, but finally changed his decision, and concluded to allow the entire claim of the State. (See a copy of his decision hereto appended, marked D.)

Under this decision, lands lying above the Racoon fork were certified to the State at different times, both by Mr. Stuart and by his successor, Mr. McClelland, amounting to about 260,000 acres, until on the 21st of March, 1856, nearly four years and a half after the decision of Mr. Stuart, above referred to, we were again overwhelmed with astonishment and vexation, by a decision of the Gen'l Land Office, to the effect that the grant extended no higher than the Racoon fork.

On an appeal to the Secretary of the Interior, the advice of the Att'y Gen'l was again sought, which was given in an opinion promulgated on the 29th of May, 1856. The conclusion to which Mr. Cushing arrives, is, that although the original grant did not rightfully extend above the Racoon fork, still, that the government was now fully committed to the more liberal construction, and it was too late to retrace its steps. He says, among other things: "I think that it must be a clear case of manifest illegality in the work commenced and half executed by one Secretary, to justify the abandonment of it by his successor. Is the present such a case of palpable violation of the law? That cannot be pretended

in the face of the opinions of Mr. Walker and Mr. Johnson, and the administrative acquiescence in those opinions on the part of Mr. Stuart." (See pamphlet opinion herewith filed, page 8.)

He therefore advises the Secretary to propose to the State of Iowa to acquiesce in and accept the decision of Mr. Stuart as final, and to approve selections accordingly, provided the State will agree to acquiesce in and accept the decision as final. (Ib., page 12.)

But the Att'y General also came to the conclusion that this decision limits the grant within the present boundaries of the State, which do not include the whole river, although it was all embraced within the Territory of Iowa at the time the grant was made; and the late Secretary of the Interior, in acquiescing in the above recommendation, directs that no more lands should be certified to the State, unless she should directly or indirectly agree to limit her claims to her own boundaries. (See copy of his communication hereto appended, marked E.)

Since that time no more lands have been certified, and no such assent has been given by the State. Having carefully examined the opinion of Mr. Cushing, as well as all the other papers and documents in the case, the undersigned has arrived at the firm conclusion that the decision of Mr. Stuart does not contemplate a limitation of the grant to the State boundaries; and that in his conclusion to that effect, the Att'y Gen'l has committed many fundamental errors, not only of logic, but also of fact, among which are the following:

1st. He takes the ground that "the act of Congress cannot be executed, if it be so construed as to assume that the grant extends to Minnesota. It contains no provisions, in virtue of which our State is to hold public domain within the limits of another State, or inchoate State." (See pamphlet opinion, herewith filed, page 10–a.) He here overlooks the important truths, that the State do not derive their power to hold real estate from any act of Congress; that this is a part of that sovereign power which is inherent, and is not limited by any constitutional restriction; that the right to land, as a mere proprietor, is a very different thing from a claim to civil jurisdiction within another State; and that nothing is more common in this country than for one government (either federal or State) to hold lands within the limits of another.

2d. He further says: "Impressed by the force of this consideration, Mr. Walker excluded from the purview of the grant the land on one side of the river for the length of twenty-five miles, though plainly comprehended by the letter of the act." (See pamphlet opinion, page 10–b.) This has reference to the decision of Mr. Walker, which declares "that the grant in question extends on both sides of the river, from its source to its mouth, but not to lands on the river in the State of Missouri."

Mr. Cushing could not have certainly remembered that the act

of August 8th, 1846, making the grant, requires the land "to be selected within the said Territory" (of Iowa). This condition prevents us from going into Missouri, but does not exclude us from Minnesota, which was then a portion of Iowa.

3d. He also says: "Such was the understanding of the subject which guided the action of Mr. Stuart, the lists which he approved expressly referring to the limit of the north boundary of the State." (See pamphlet opinion, page 10–c.) This is a downright mistake in point of fact, as will be shown beyond all controversy, if a proper opportunity is allowed, leaving not the slightest foundation for this conclusion of the Att'y Gen'l in relation to the scope of Mr. Stuart's decision.

The State is willing to accept of that decision as a finality, to whatever conclusion that may lead us. In fact we regard ourselves as entitled to claim this as a right, involving a corresponding obligation on the part of the federal government, and such seems to have been the opinion of Mr. Cushing. What just government would seek to prescribe terms as a condition, for a performance on its part of a simple act of duty? Shall we be refused an acknowledged right, unless we will submit to what we believe a manifest wrong? The proposition presented embraces two distinct matters: 1st, the rule; and 2d, its application and extent. We accept the former; we wish to discuss the latter.

The action of the late Secretary was not a final decision. It contemplated that a proposition should be made to the State. This presupposes the right of the State to accept, or reject, or to suggest modifications. Especially does it allow of a counter proposition for the correction of any palpable errors that may have been committed.

Under this impression, instead of unqualifiedly accepting or rejecting the proposition presented, the undersigned suggested a modification in accordance with the views hereinbefore expressed. (See copy of letter hereto appended, marked F.) In doing this he was not aware of going beyond the bounds of propriety. He regarded the parties to this controversy as two independent powers, acting through their authorized agents, standing for the time upon the same level, and mutually attempting by amicable means to give effect to the will of their common superior, the law. If this be an error of judgment, it is not one of intention.

Entertaining such views, he was not a little surprised at receiving the reply hereto appended (marked G), which effectually closes the door to all further correspondence on the subject, and leaves no avenue of hope except that to which he now resorts.

As to the negligence on the part of the State, upon which some stress is laid by the Secretary in his late letter, it may be proper to observe, that although nearly two years have elapsed since the decision of the late Secretary, still that decision has never been offi-

cially communicated to the authorities of the State to this day. The agents of a company who had taken a contract from the State seem to have been apprized of that decision; but, as far as we now know or believe, the State authorities never knew of that decision, even by rumor, until some time during the past year.

At the first session of the legislature thereafter an act was passed appointing the undersigned a commissioner with full powers over this subject. That law took effect on the 14th of April last, previous to which time no person on earth had authority to act definitely on this subject. Within sixteen days thereafter he had travelled from Iowa, examined the papers of the case, and filed his assent to the substantial portion of the proposition of Secretary McClelland. It will certainly be surprising if there is such negligence on the part of the State as to weigh against us in the decision of this important question.

The undersigned is firmly convinced that by a just and legal construction of the act of August 8th, 1846, the grant would extend to the source of the Des Moines river. This conviction is confirmed by the unqualified opinion of many eminent jurists, among whom are the late Col. Benton, Mr. Buell of Michigan, and Chancellor Walworth and Judge Bronson, of New York. Copies of their opinion may be found in the report of the commissioner and register of the Des Moines river improvement, herewith filed, pages 30 to 40 inclusive. At all events, the decisions of Mr. Walker and Mr. Stuart, followed by the action and acquiescence of the government for so many years, entirely put an end to any question or doubt that otherwise might have existed. Under these circumstances, he does not feel justified in abandoning any part of these lands while a hope remains of securing the rights of the State. Resort would at once be had to the legal tribunals, but for the length of time necessary to obtain a final decision. Such are our present necessities that the lands below the State boundary would now be of more value than the whole at the end of a litigation which at least will require several years.

To show the sincerity of the confidence above expressed, a proposition has been made to the Secretary, (and rejected,) to the effect that the lands lying within the State, and as to which there is no dispute, shall be certified at once, and that immediate steps be taken to bring the question of title to the remainder before the federal courts. By such an arrangement, if we are not legally entitled to the land in Minnesota, we shall not obtain it. If we are so entitled, should the government object to our receiving it?

Except in this single instance, it seems to have been the uniform practice of the federal government to construe all grants made by Congress to the States with liberality. At all events, it is believed that no other State has ever been harassed and tantalized as ours has been in this instance.

When the decision of Mr. Walker, of March 2d, 1849, had been made, the State felt justified in forming her plans accordingly. A scale of improvement was adopted, corresponding to the fund at our disposal; and contracts were made for completing the projected work. The decision of Mr. Ewing paralyzed the power of the State, rendered her unable to perform her engagements with contractors, caused the works in progress to be suspended, and it was at a cost of nearly $50,000 that the claims of contractors, growing out of the suspension, were finally adjusted. The indirect injuries, resulting from freshets and other causes during the long suspension, thus rendered necessary, was far greater in amount, but is not capable of being computed.

Again, when, after the delay of a year and a half, Mr. Stuart finally affirmed the decision of Mr. Walker, and a large amount of lands above the Racoon fork had been certified to the State, we certainly had reason to apprehend no further disappointment. The works were again commenced; and finally, on the 9th of June, 1854, a contract was made with an eastern company for the completion of the entire improvement to the Racoon fork. Within two years thereafter, and just as the company were prepared to prosecute their work with vigor, comes the decision of March 21st, 1856, which entirely crippled all their future operations, frustrated the purposes of both the parties to that contract, and gave rise to a virulent controversy between them, which, for a while, absorbed their attentions, and diverted their efforts from all matters connected with the extent of this grant. Again, the interests of the State had to be sacrificed, and at an expense of several hundred thousand dollars to the State. The contract has finally been set aside by mutual consent.

And now, while we are informed by the law officer of the government that we have a just right to insist upon that decision, as to the grant, which has been so often given and so long acquiesced in by the proper authorities of the federal government, and while we assent to that decision and claim its benefits, we are informed that, unless we also assent to a construction thereof which we believe wholly repugnant to its spirit and effect, our express assent will be regarded and treated as an unqualified rejection.

We believe this to be wholly unreasonable, and therefore seek relief through the only adequate means within our reach.

In the statements and observations above made, the undersigned has endeavored to confine himself strictly to those matters which are necessary to enable your excellency to decide the point last made before the Secretary of the Interior—that is to say, whether we must unqualifiedly accept or reject the decision of Mr. Stuart, coupled with the construction given it by Mr. Cushing, or whether we may obtain a division of the subject, accept the decision, and test its scope and meaning in some just manner. Should the decision on this question be in our favor, or should the merits of the

case in any other way be open for discussion before any impartial tribunal, and opportunity to file an argument in chief is respectfully solicited.

Yours, very respectfully,

CHAS. MASON.

To his Excellency the PRESIDENT.

Appendix.

A.

Extract from a letter from the Commissioner of the General Land Office to the Seretary of the Board of Public Works, dated February 23d, 1848:

"A question has arisen as to the extent of the grant made to Iowa by the act of 8th of August, 1846, and the opinion of this office has been requested on that point. By the terms of the law the grant is of an equal moiety, in alternate sections, of the public lands, (remaining unsold and not otherwise disposed of, incumbered or appropriated,) in a strip five miles in width, on each side of said river, to be selected within said Territory, &c., &c., and the proceeds are to be applied in the improvement of the navigation of that river from its mouth to the Racoon fork; hence the State is entitled to the alternate sections within five miles of the Des Moines river, throughout the whole extent of that river within the limits of Iowa."

B.

TREASURY DEPARTMENT,
March 2d, 1849.

GENTLEMEN: I have the honor to acknowledge the receipt of your communication of 8th January last, and accompanying papers, on the construction of the act of Congress "granting lands to the Territory of Iowa, to aid in the improvement of the navigation of the Des Moines river, in said Territory," approved 8th Aug., 1846. I concur with you in the views contained in your communication, and am of opinion that the grant in question extends, as therein stated, on both sides of the river from its source to its mouth, but not to lands on the river in the State of Missouri. I have transmitted your communication and accompanying papers, with a copy of this letter, to the Commissioner of the General Land Office.

I have the honor, &c.,

R. J. WALKER,
Secretary of Treasury.

Messrs. A. C. DODGE,
G. W. JONES,
L. LEFFLER,
WM. THOMPSON.

C.

TREASURY DEPARTMENT,
March 2d, 1849.

SIR: For your information and government on the subject which it refers, I enclose a copy of a letter addressed by me, under this date, to members in both houses of Congress from the State of Iowa, with reference to the construction of the act of the 8th August, 1846, granting certain lands to the Territory of Iowa, to aid in the improvement of the navigation of the Des Moines river.

I also enclose the letter to which the within is a reply, and accompanying papers.

Very respectfully,

R. J. WALKER.

R. M. YOUNG, Esq.,
Commissioner.

D.

DEPARTMENT OF THE INTERIOR,
Washington, Oct. 29th, 1851.

SIR: I herewith return all the papers in the Des Moines case, which were recalled from your office about the first of present month.

I have reconsidered and carefully reviewed my decision of the 26th of July last, and in doing so, find that no decision which I can make will be final, as the question involved partakes more of a judicial than of an executive character, which must ultimately be determined by the judicial tribunals of the country; and although my own opinion on the true construction of the grant is unchanged, yet, in view of the great conflict of opinion among the executive officers of the government, and also in view of the opinions of several eminent jurists which have been presented to me in favor of the construction contended for by the State, I am willing to recognise the claim of the State and to approve the selections, without prejudice to the rights, if any there be, of other parties, thus leaving the question as to the proper construction of the statute entirely open to the action of the judiciary.

You will please, therefore, as soon as may be practicable, submit for my approval such lists as have been prepared, and proceed to report, for like approval, lists of the alternate sections claimed by the State of Iowa above the Racoon fork, as far as the surveys have progressed, or may hereafter be completed and returned.

I am, sir, very respectfully,

Your ob't serv't,

ALEX. H. H. STUART,
Secretary.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

E.

DEPARTMENT OF THE INTERIOR,
June 9th, 1856.

SIR: I return herewith the papers in reference to the grant for the improvement of the Des Moines river, which accompanied your report of the 24th of March, and enclose therewith several letters and arguments which have been received here since the date of your report.

Having submitted the subject to the Att'y General for his opinion upon the question involved, I enclose a copy of such opinion, furnished me under date of the 29th ultimo; and also a letter under date of the 5th inst., from the Hon. Reverdy Johnson, (the att'y for the claimants under the grant,) in regard to the conditions upon which subsequent approvals, up to the limits of the State of Iowa, are recommended by the Attorney General to be made.

In the subsequent action upon selections not yet approved, I have concluded to be governed by the advice of the Attorney General, as contained in the paragraph near the close of such opinion, beginning with the words, "I advise, therefore, that you propose to the State of Iowa and its assigns," and ending with "you can with safety award to them the residue of the claim up to the northern boundary of the State."

It will be perceived, from the endorsement on Mr. Johnson's letter, above referred to, that he has undertaken to procure the assent of the State and its assigns to the conditions referred to, so that the necessity is obviated of any direct proposition to that effect on the part of the department; but no further action will be taken until the parties are heard from on this point.

In the certificate of approval, hereafter prepared for my signature on any lists submitted, the fact should be stated that the approval being based upon the prior action of the department, and upon the ground that the grant is to be confined to the northern boundary of the State of Iowa, the acceptance by the State and its assigns would be considered an acquiescence, on their part, in this limit, and an abandonment of all claim beyond it, as it is upon this basis alone I can feel justified in yielding my assent to the claim preferred.

Should the assent of the parties be given in writing, the certificate of approval will be so varied from the language above as to conform to that state of facts, but without losing sight of the real groundwork of my assent to the approval.

Respectfully, your obedient serv't,

R. McCLELLAND,
Secretary.

The Hon. THOMAS A. HENDRICKS,
Commissioner of the General Land Office.

F.

WASHINGTON, *April 30th*, 1858.

SIR: In our recent conversation relative to the settlement of the controversy in regard to the extent of the Des Moines river grant, you expressed a readiness to abide by the proposition of your immediate predecessor, founded upon the opinion of the late Attorney General, dated May 29th, 1856. That proposition was, that the decision of Mr. Secretary Stuart of 29th October, 1851, founded on that of Mr. Walker's of March 2d, 1849, should be adopted as final and conclusive.

As agent for the State of Iowa, with full power over this subject, I am willing to accept this proposition thus far. But the late Attorney General has arrived at the conclusion that this rule will confine the grant to the present limits of the State of Iowa; and one branch of the proposition presented by your predecessor has accordingly been, that the State should relinquish all claim to lands north of her present boundaries. Fully satisfied that a fair interpretation of the decisions of Messrs. Walker and Stuart would lead to no such conclusion, and that the opinion of the late Att'y General in this respect was palpably erroneous, mainly in consequence of mistakes in regard to matters of facts, I desire this branch of the subject to remain open, and that I be permitted to show the truth of what I now state in such a manner as you may think reasonable and proper.

The State of Iowa desires protection in all her just claims, and she will ask for nothing more. If, upon a proper examination, it be found that a fair construction of the decision of Mr. Stuart, founded on that of Mr. Walker, will limit the grant to the present boundaries of the State, I will at once, on the part of the State, relinquish all claim to such lands as lie in Minnesota, and thus terminate this long controversy.

Yours, very respectfully,
CHA'S MASON,
Agent and Att'y for Iowa.

Hon. JACOB THOMPSON,
Secretary of the Interior.

G.

DEPARTMENT OF THE INTERIOR,
Washington, May 17th, 1858.

SIR: I have to acknowledge the receipt of your communication of the 30th ultimo, relative to the settlement of the controversy as to the extent of the Des Moines river grant.

The decision of my immediate predecessor of the 9th June, 1856, I regard as a proposition made to the State of Iowa for a final adjustment, and your present communication is not an acceptance of the proposition on the part of the State.

When it is considered that nearly two years have elapsed, and no formal acceptance has, in the mean time, been presented here, if this be the only communication that you have to make, I feel authorized to regard your letter now before me as an authoritative rejection of that proposition.

Very respectfully, your ob't serv't,

J. THOMPSON, *Secretary.*

Hon. CHARLES MASON,
Agent for the State, present.

The President referred the subject to the Att'y General, who delivered the following opinion:

ATTORNEY GENERAL'S OFFICE,
Nov. 22*d*, 1858.

SIR: On the 18th of August, 1846, Congress made a grant to the Territory of Iowa in the following words: "That there be and hereby is granted to the Territory of Iowa, for the purpose of aiding said Territory to improve the navigation of the Des Moines river from its mouth to the Racoon fork (so called) in said Territory, one equal moiety in alternate sections of the public lands, (remaining unsold and not otherwise disposed of, incumbered or appropriated,) in a strip five miles in width on each side of said river, to be selected within said Territory by an agent or agents, to be appropriated by the governor thereof, subject to the approval of the Secretary of the Treasury of the United States."

The question arising on the construction of this law has been debated for upwards of twelve years without being settled. You ask my opinion upon it now, as if nothing had ever been said or done about it before. I do not doubt that you are right in regarding it still as sub judice and undetermined, open as it ever was to the operation of the principles which ought to have governed it originally. But in forming our judgment upon it we cannot help looking up with becoming respect to the opinions of the eminent men who have heretofore had it under consideration. The act gives to Iowa, for the purpose of improving the Des Moines from the mouth to the Racoon fork, certain lands on both sides of the river. Does that mean that the Territory shall have the prescribed quantity of lands on all parts of the river up to its source, or is the grant, like the improvement it aids, confined to that part of the river which runs below the fork? The simple reading of the act leaves on my own mind the impression that no lands above the fork were meant to be included. Taking into consideration nothing but the words of the grant, I cannot but think it probable that the person who drew it understood it himself, and intended that others should understand it, as giving merely a moiety of the unappropriated public lands which lay within five miles of the river,

between its mouth and the fork. I believe too that such words in such a collocation would naturally be supposed by most members of Congress to concede nothing more; nor is there, in my opinion, any established rule of interpretation, which forbids us to say that the words, "from its mouth to the Racoon fork," qualify and limit both the grant and the improvement. The lands given and the work to be done are described in the same sentence, and a limitation which is not necessarily confined to one may well be applied to both without being repeated. There is an argument, to be sure, and a specious if not a strong one, on the other side. But this does not destroy nor explain the opposing view; it only shows that something may be said on both sides. The grant is certainly obscure in its phraseology. A person whose faculties are sharpened by an interest in the claim can see it extending to the headwaters of the Des Moines plainly enough, while an advocate of the other side might perceive with equal clearness the construction which stops it at the Racoon fork; nay more, it has actually divided the judgment of the ablest men and the soundest lawyers in the service of the government. Mr. Walker and Mr. Johnson could not have been in favor of the larger interpretation, unless there had been cogent and good reasons for it. On the other hand, Mr. Ewing, Mr. Crittenden, and Mr. Cushing would not have set their faces against it if opposite considerations of great weight had not been presented to them. And surely, if it had been a tolerably plain case either way, Mr. Stuart and Mr. McClelland would not have kept it poised in their scales for seven years without determining where the preponderance was; much less would either of them have offered to settle it by a compromise. In truth, this law has been treated for a dozen years as no plainly written law could be treated.

But, for my own part, I have not the least doubt about it; my reason may seem paradoxical, but the very obscurity of the grant, in my judgment, makes it clear. It is out of these doubts that certainty grows. In every doubtful case we know very well what we ought to do, as soon as we ascertain which party is entitled to the benefit of the doubt. We shall see who is entitled to it here.

It is well settled, that all public grants of property, money, or privileges are to be construed most strictly against the grantee. Whatever is not given expressly, or very clearly implied from the words of the grant, is withheld. This is most especially true of legislative grants, and for very good reasons the rule ought to be adhered to with unyielding firmness. We all know the fact, and we are not bound to seem ignorant of it, that gifts like these are often caused by private solicitations and personal influence. The bills are almost universally drawn up by their special friends, and may be made ambiguous on purpose to disarm their opponents or

put suspicion asleep. If you let the grantees have the advantage of the ambiguity which they themselves put into their own laws, many of them will get a meaning which Congress never thought of. Acts which were supposed to have but little in them when they passed will expand into very large dimensions afterwards. An ingenious construction will make that mischievous which was intended to be harmless. The remedy for these evils—and they are evils to the public morals as well as to the Treasury—is to let all men know that they can get nothing from the United States except what Congress has chosen to give them, in words so plain that their sense cannot be mistaken.

I do not know any reason for suspecting the slightest bad faith in this case. But it comes within a general rule which must be maintained in order to prevent a general mischief. It should, however, be remembered, that the grant was construed at the land office, immediately after its passage, to extend no further than the fork, and this was acquiesced in by the State authorities for upwards of two years.

The idea that it went to the source of the river was certainly an after-thought. I do not say that this estops them now, or that their mistake, if it had been a mistake, should prevent them from getting all that was given. But when this law was on its passage it would have been easy to say, that half the land on each side of the river up to its source should belong to the Territory; not being said, we cannot presume that it was intended. A word or two would have put the meaning beyond the reach of a doubt; but the ambiguity was left in the bill, and leaving it there was the fault of its framers and its friends. They, and not the United States, must suffer the consequences.

Very respectfully, yours, &c.,

J. S. BLACK.

Hon. JACOB THOMPSON,
Sect'y of the Interior,
Washington, D. C.

It is also admitted that the Des Moines river is now navigable by steamboats during a part of the season for some distance above the Racoon fork; several boats within the past year have successfully ascended as high as Fort Dodge, which is some eighty-five miles above that point.

The Des Moines river from its mouth to the Racoon fork is one hundred and eighty-three and a half miles in length. Had there been the full complement of five sections to the mile, the amount of land granted would therefore have been 587,200 acres, whereas the amount actually received by the State below the Racoon fork was only 321,028.03 acres, owing to the fact that a part of the land bordering on the river lay in the State of Missouri, and a

considerable portion of that lying in the State of Iowa had been disposed of by the United States prior to the 8th of August, 1846.

And it is admitted that the following affidavits and certificates are to be taken as facts in this case:

STATE OF IOWA,
Lee County, ss.

H. W. Sample, being duly sworn, says: That he was president of the Board of Public Works for two years from August, 1847, to August, 1849; that after the letter from the Commissioner of the General Land Office, dated Feb. 23d, 1848, informing the board that in his opinion the lands granted amounted to something like a million of acres lying above the Racoon forks; that after the decision of the Secretary of the Treasury of March 2d, 1849, to the same effect, no doubt was entertained on this subject; that the plans adopted for the improvement of the river were predicated entirely upon the extension of the grant to the headwaters of the river; that had it not been for these decisions in favor of this extended grant, an entirely different plan of improvement would have been adopted, corresponding with the fund provided for the purpose; that the plan adopted could not have been carried out so as to be of any benefit at all to the State with the means resulting from the lands below the Racoon fork, and that instead of being a benefit to the State, the grant would have proved a great injury, if, after having induced the board to adopt the more expensive plan of improvement, the fund provided for that improvement were to be limited to a small portion of the lands which had been supposed to be included in the grant, at the time the plans were adopted and partially carried out. He further says, that he is well satisfied that the State has sustained very great losses from the withholding of the lands above the Racoon fork, which rendered a suspension of the work necessary, by which a great amount of damages, costs, and expenses were necessarily paid by the State, an amount of the failure to complete with the contract which had been made, and which could have been complied with if the lands above the Racoon forks had been duly certified in accordance with the decision of the Secretary, of March 2d, 1849.

Keokuk, Iowa, April 11th, 1859.

H. W. SAMPLE.

STATE OF IOWA,
County of Lee, ss.

Before me, Wm. W. Bellnap, a notary public in and for the county and State aforesaid, personally came H. W. Sample, personally known to me to be the same person who signs his name to the foregoing statement; and upon being duly sworn by me, upon his oath, states that the statements and facts set forth in said state-

ment and writing is true, in accordance with his knowledge and belief.

In testimony thereof I have hereunto set my hand and seal notarial on this 11th day of April, 1859.

WM. W. BELLNAP,
Notary Public.

STATE OF IOWA,
Lee County, ss.

Samuel R. Curtis, of lawful age, being duly sworn, deposes and says: That in the fall of the year A. D. 1847, he was a resident of the State of Ohio, and was called upon by H. W. Sample, esq., then president of the Board of Public Works of Iowa, and urged to accept the post of chief engineer of the Des Moines river improvement in the State of Iowa. Deponent had previously constructed the slackwater improvements on the Muskingum river, and a similar work appeared reasonable, and suited to the Des Moines. Deponent examined the whole subject of appropriation and probable fitness of means to the end, and supposing the grant of land extended to the source of the Des Moines, he supposed that, with economical plans and execution, a substantial and valuable river improvement could be made, and he therefore accepted the place, and accompanied the president of the board to Keokuk, in the State of Iowa. The survey of the river was commenced about on the 5th day of December, 1847; and early in March, 1848, he had matured plans, located, and advertised for letting the first section of the work. In June following, (i. e. June, 1848,) the work was let to contractors, many of whom came from the Muskingum river, where they had constructed locks and dams of a similar character, and thus, on a plan suited for commercial purposes, similar to other steamboat river improvements then in full operation in Ohio, Pennsylvania, and Kentucky, deponent, under the direction of the State board, commenced the Des Moines improvement. All the plans and purposes of the work were predicated on the belief that the grant extended to the sources of the Des Moines, and deponent never would have removed to Iowa, and identified himself with the work, if he had supposed the grant, which was the only reliable means for the improvement, was limited to the inconsiderable portion of land that then lay below the Racoon fork. Deponent never heard any doubt expressed as to the grant running to the sources of the Des Moines till long after the construction had progressed, and contractors, manufacturers, and many wealthy and worthy citizens of Ohio had removed from Ohio and settled in the Des Moines valley, when they supposed a grant and substantial work, similar to those they had seen in Pennsylvania and Ohio, were in due time certain of being carried out by the economical applications of the Des Moines grant.

When, in 1850, the further certificate of lands was withheld from the State, and the work was consequently arrested, great injury was done to contractors, some of whom prosecuted the board for consequential damages, and to the knowledge of deponent recovered some $25,000. And deponent understood other settlements were made to compensate for this interruption of the work, which in the opinion of deponent amounted (with the sum collected by suit and attendent costs and expenses) to at least fifty thousand dollars.

Deponent makes this statement of matters relating to the Des Moines improvement at *this* instance of the Hon. Chas. Mason, att'y for the State of Iowa; and for his views more fully expressed, he referred to the "report of the Board of the Public Works on the improvement of the Des Moines river, December 1st, 1848," which he assisted in compiling, and which contains his report 1, 2, and 3, which show his ideas then expressed of the plan and the extent of means applicable to the work.

SAMUEL R. CURTIS.

Sworn to and subscribed before me, at Keokuk, Iowa, April 8th, 1859.

ROBERT H. GILLMORE,
Notary Public, in and for Lee County, Iowa.

STATE OF IOWA, *Lee County, ss.*

Guy Wells, of said county, being duly sworn, says: That he has been engaged on the Des Moines river improvement, as principal assistant engineer, from the fall of 1847 to the summer of 1850, as chief engineer from the summer of 1850 to June 4th, 1854, as principal assistant engineer from June 4th, 1854, to January 1st, 1858, and as chief engineer from January 1st, 1858, to the present time. He is well aware of the fact that the plans originally adopted for the improvement of the river were founded entirely upon the expectation of obtaining the lands along the Des Moines river, from its mouth to its source, within what was the Territory of Iowa, on the 8th day of August, 1846. That he well knows that after the decision of the Secretary of the Interior, of October, 1851, by which the lands along the Des Moines river to its very source were to be certified to the State, a plan of improvement was adopted somewhat different from that originally proposed, but founded entirely upon the faith then entertained by the State, that this decision would be fully and fairly carried out. That a large amount of work was undertaken upon the improvement, little or none of which was completed at the time of the refusal of the Secretary of the Interior to certify any more lands, which decision was made some time in the spring of 1856. That some time in the month of June, 1854, a contract was made by the proper authorities of the State, with what was known as the "Demoines Navigation and

R. Road Company," by which most of the work last above mentioned was done, and that a large amount of land had been certified by the Secretary of the Interior to the State, and by the State had been turned over to the said company in payment of the work which they had done under the said contract. That upon the refusal of the Secretary of the Interior in April, 1856, to certify any more lands to the State, a warm controversy sprung up between that company and the State, which was finally compromised by a transfer to the company of all the remaining lands which had been certified to the State, which included all the lands not previously transferred which lay below the Racoon fork, and all the land that has been certified to the State which lays above that fork. That all the work that has now been done is rather an injury than a benefit to the navigation of the Des Moines river, unless the works which have been commenced, and which are now an obstruction to the navigation of the river, can be completed, and that the whole grant has therefore been a positive detriment to the navigation of the river, if nothing further is to be certified and allowed to the State from that source.

GUY WELLS.

Subscribed and duly sworn to before me, this 18th day of April, 1859. Witness my hand and official seal.

W. C. STRIPE,
Notary Public.

I hereby certify that in consequence of the suspension of the work on the Des Moines river, growing out of the adverse decision of Mr. Secretary Ewing in April, 1850, a great injury was sustained by floods, waste and injury to materials, which would have been avoided had that decision not been made and the work allowed to go on. The amount of this injury cannot be precisely ascertained, but it was certainly not less than seventy thousand dollars.

GUY WELLS.

And the following certified transcript from the House of Representatives of the U. S. is also in evidence for what it is legally worth as facts:

OFFICE HOUSE OF REPRESENTATIVES U. S.,
August 19th, 1858.

I, James C. Allen, Clerk of the House of Representatives of the U. S., do hereby certify that the following bill (No. 106,) entitled "A bill granting certain lands to the Territory of Iowa, to aid in the improvement of the navigation of the Des Moines river, in said Territory," and the following report (No. 680,) made by Mr. McClernand, from the Committee on Public Lands, on the 19th May, 1846, are true copies of the originals now on file in this office.

In testimony whereof, I have set my hand and affixed the seal of the House of Representatives, this 19th of August, 1858.

Attest: J. C. ALLEN, *Clerk.*

29th Congress, 1st Session—H. R. 106.—[No Report.]

January 13th, 1846.—Mr. Dodge, on leave, introduced the following bill, which was read twice and referred to the Committee on Public Lands.

May 19th, 1846.—Mr. McClernand, from the Committee on Public Lands, reported back the following amendatory bill, which was committed to the Committee of the Whole House on the state of the Union:

A bill granting certain lands to the Territory of Iowa, to aid in the improvement of the navigation of the Des Moines river, in said Territory.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, granted to the Territory of Iowa, for the purpose of aiding said Territory to improve the navigation of the Des Moines river, from its mouth to the Racoon fork, (so called,) in said Territory, one equal moiety, in alternate sections, of the public lands, (remaining unsold and not otherwise disposed of, incumbered or appropriated,) in a strip five miles in width on each side of said river; to be selected within said Territory by an agent or agents to be appointed by the governor thereof, subject to the approval of the Secretary of the Treasury of the United States.

Sec. 2. And be it further enacted, That the lands hereby granted shall not be conveyed or disposed of by said Territory, nor by any State to be formed out of the same, except as said improvements shall progress; that is, as soon as a section or mile, or any greater extent of such work, shall be completed and duly certified by the governor of said Territory or State to the President of the United States, the said Territory or State may sell and dispose of a quantity of said land on each side of the work, so completed and certified as aforesaid, equal to the value thereof; and so, from time to time, as the work progresses and said certificates are made, until said work is completed: Provided, said lands shall be used for the purpose mentioned in this act, and no other.

Sec. 3. And be it further enacted, That the said river Des Moines shall be and forever remain a public highway for the use of the government of the United States, free from any toll or other charge whatever for any property of the United States, or persons in their service, passing through or along the same: Provided, always, That it shall not be competent for the said Territory or future State of Iowa to dispose of said lands, or any of them, at a price lower than, for the time being, shall be the minimum price of other public lands.

29th Congress, 1st Session.—Rep. No. 680.—Ho. of Reps.

Des Moines River.—[To accompany bill H. R. No. 106.]

May 19th, 1846.—Mr. McClernand, from the Committee on Public Lands, made the following report:

The Committee on Public Lands, to whom was referred the petition of certain citizens of Iowa for a grant of land for the improvement of the Des Moines river, and also a bill introduced on that subject by Hon. A. C. Dodge, delegate from Iowa, ask leave to report:

That the Des Moines river is one of the largest and most important tributaries of the Mississippi, above the Missouri. It rises in the Shetch lakes, on a ridge of land in latitude 44° 3′ north, and flowing through a lake country and through swampy grounds in its upper course; it subsequently receives Lizard and Racoon rivers on the right, and Saunkakee and Boon's rivers on the left; all considerable streams. Its waters are rolled through a highly fertile and beautiful region, nearly all of which is now in possession of the United States, and the lower portion of which is now occupied and improved to the Racoon river by a hardy and industrious population, who are testing the productiveness of the soil by well directed labor and bringing out the resources of the country, and daily adding value to the public domain in this quarter. Portions of this stream, in its course of upwards of five hundred miles, have already been visited by boats on several occasions, and proved to be adapted to steamboat navigation for considerable distances without any improvement. Other portions intermediate require that improvement should be made by the removal of existing obstructions, in order to have a clear uninterrupted navigation. An expenditure not great, compared with the object, will make this stream navigable for a small class of steamboats for upwards of three hundred miles. It is now navigable for such boats during a portion of the year, in the spring floods, as high as the Buffalo fork, which is two hundred miles from its mouth. Over this portion some expenditure will be necessary, however, to render it navigable at all times.

The grant of land provided by the bill which accompanies this report is similar in its character and object to many heretofore made by Congress to several of the Western States and Territories, and at the same time is less in amount, but it is believed will be sufficient to accomplish the desired improvement. This river has been examined by Captains Guion and Fremont, of the topographical engineers, and their reports on the subject are referred to for a clearer understanding of the character of the river and country, its susceptibility of improvement and the advantages thereof.

Many of the difficulties in the navigation of this stream are caused by ripples, and may be overcome by making slack water; others may be removed by taking away rocks, and by other means, such as the removal of snags and trees. Captain Guion, who examined it from its mouth to seventeen miles above Racoon, suggests the several modes last named, and adds:

"The Des Moines is a beautiful river, 220 feet wide where I ceased operations, and increasing in width from 440 below the mouth of Racoon fork, to 630 at the trading house," (this is 100 miles from the mouth,) "whilst its banks present one of the most fertile and lovely countries nature ever presented to the view of man, abounding in immense fields of bituminous coal, from Racoon fork nearly to its mouth. Iron, too, I found scattered along the banks of the river." (Ex. Doc. 27th Congress, 3d Session, Doc. 38.)

Captain Fremont says:

"From the Racoon fork to its mouth the Des Moines winds a circuitous length of two hundred and three miles, through the level and rich alluvium of a valley of one hundred and forty miles long, and varying in breadth from one to three and sometimes four miles. Along its whole course are strips of dense wood, alternate with rich prairies entirely beyond the reach of the highest waters, which seldom rise more than eight feet above the low stage.

"Steamboats drawing four feet water may run to the mouth of Cedar river, from the first of April to the middle of June; and keel-boats drawing two feet, from the twentieth of March to the first of July, and those drawing twenty inches, again, from the middle of October to the twentieth of November. Mr. Phelp ran a Mississippi steamer to this post, a distance of 87 miles from the mouth. From these observations it will be seen that this river is highly susceptible of improvement, presenting nowhere any obstacles that would not yield readily, and at slight expense. The removal of loose stones at some points, and the construction of artificial banks at some few others, to destroy the abrupt bends, would be all that is required. The variable nature of the bed and the velocity of the current would keep the channel constantly clear." (Ex. Doc. 27th Congress, 3d Session, Doc, 38.)

The relation of the Des Moines with the St. Peter's, and, through that, its connection with other waters, presents a consideration not to be overlooked in deciding on the expediency of improving its navigability. On this point, the following interesting fact is communicated by Mr. Nicollet:

"The hydrographical relations of the Des Moines with the Manhato, St. Peter's, and Mississippi rivers present a geographi-

cal incident of some interest. By referring to the map, in latitude 43° 45′, longitude 95° 12′, it will be seen that there is a lake very near the Des Moines, named Tchanshetcha, or Dry-wood lake. The Watonwan river, which is a tributary to the Manhato, that empties itself into the St. Peter's, has its source in this lake. Now, the tongue of land separating the Des Moines from Tchanshetcha lake is not more than a mile to a mile and a half broad, so that were a canal cut across, the waters of the Des Moines would be made to communicate with the St. Peter's."

On a careful examination of this subject, and confiding in the reports above referred to, the committee have concluded to report the accompanying bill, with a recommendation that it do pass.

GENERAL LAND OFFICE, *May 5th*, 1846.

SIR: In answer to your inquiry, I have the honor to state, that the amount of unsold land within five miles on each side of the Des Moines, from its mouth to the Racoon fork, proposed to be granted to the Territory of Iowa by House bill No. 106, is estimated at 261,000 acres.

There have been sold in the Territory of Iowa, to the 1st of January, 1846, 1,730,050 acres, and the amount of purchase-money received by the United States to the same date is $2,164,102.

Very respectfully, your ob't serv't,

JAS. SHIELDS, *Commissioner.*

Hon. A. C. DODGE,
House of Representatives.

And it is further admitted that the Congress of the United States, by an act approved 15th May, 1856, granted to the State of Iowa, for the purpose of aiding in the construction of a railroad from Dubuque to a point on the Missouri near Sioux city, every alternate section of land, designated by odd numbers, for six sections in width on each side of said road; that the State of Iowa, by an act of the legislature, approved 14th July, 1856, accepted said grant and regranted the lands to the Dubuque and Pacific Railroad Company; and that said company accepted the said grant made by the State, and filed their acceptance thereof in the office of the secretary of the State of Iowa; and that the land in suit is within six miles of the Dubuque and Pacific Railroad; that said road is on the route designated by said act of Congress; and that everything was done on the part of said State and said railroad company to perfect the title of said land in said railroad company, if, under all the circumstances of the case, the said land does not belong to plaintiff, deriving title under the said act of 8th of August, 1846.

And it is admitted that said railroad company are in possession of said land, claiming ownership under said act of Congress of the 15th of May, 1856.

It is expressly agreed by the parties signing this agreed statement that the matters and things therein stated are only to be taken for what they are legally worth; and that all objections on account of immateriality or irrelevancy are *saved* by the parties respectively.

Oct., 1859.

CHAS. MASON,
Att'y for Pl'ff.
PLATT SMITH and
JAMES M. McKINLEY,
Att'ys for Defendant.

Filed Oct. 26th, 1859.

J. C. BURNS, *Cl'k.*
By W. WIRT MILLS, *Deputy.*

EDWIN C. LITCHFIELD
vs.
DUBUQUE AND PACIFIC R. R. Co. } No. 150. Right.

This cause having been heard on the declaration, plea, and agreed statement of facts, and the arguments of counsel having been heard, the court, upon consideration, is of opinion that the facts do support the declaration: thereupon, it is ordered, considered, and adjudged that the plaintiff hath right to the lands claimed, and to the possession thereof, and that a writ of possession issue to put him in possession; also, that pl'ff have and recover of defendants one cent damages for detention of said lands, and that pl'ff have and recover of defendants costs to be taxed by the clerk.

United States District Court for the district of Iowa, northern division.

I, J. C. Burns, clerk of the district court aforesaid, do hereby certify, that the foregoing is a true and correct transcript of the record and papers in cause No. 150, at the October term of said court, wherein Edwin C. Litchfield is plaintiff, and the Dubuque and Pacific Railroad Company is defendant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court. Done at Dubuque, in said district, this tenth day of November, A. D. 1859.
[SEAL.]

J. C. BURNS, *Clerk.*
By W. WIRT MILLS, *Deputy.*

THE DUBUQUE AND PACIFIC R. R. Co., Pl'ffs in Error,
v.
EDWIN C. LITCHFIELD, Def. in Error.

In Supreme Court U. S.—Writ of Error to the D't C't of U. S. for the district of Iowa—December Term, 1859.

Assignment of Errors.

Now come the plaintiffs in error and say that there is error in the record and proceedings in this cause, in this, to wit:

1st. The court erred in deciding that the grant made for the improvement of the navigation of the Des Moines river from its mouth to the Racoon fork extended above said fork.

2d. The court erred in deciding that the plaintiff below had or could have any title to the tract of land in dispute, under the act of Congress making the grant to aid in said improvement.

3d. The court erred in ruling that the language, "a strip five miles in width on each of said river," should be construed to mean the entire river from its mouth to its source, whereas the term "said river" refers to the Des Moines river, from its mouth to the Racoon fork only.

PLATT SMITH,
Counsel for Pl'ffs in Error.

Filed 23d November, 1859.

[REC. CCL, D. T., 1859.]—7